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创意产业的著作权保护—

中国，西班牙以及欧盟的比较

Copyright Protection for Creative Industries

A Comparison among China, EU and Spain

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It is now time for me to open another interesting chapter in my career path and the time spent in China has allowed me to broaden my perspectives and my understanding of this great culture.

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Abstract

In the new world of globalization, there are many technological changes that are in our life, information changes so fast, and creativity and innovation are some of the things that are necessary in today's day and age to survive with the new mentality.

The ideas, the information, the art, the books, the performances, the music, etc. they are all used as tools to change the mentality and the different points of view, in fact they are responsible to build a culture and to put up the identity that the members of the society belong to.

For this reason, it is essential that we protect ideas and designs; they are the new creations and they need to be sheltered. Chapter I of this thesis is going to explain what intellectual property (IP) law is, and how it began to appear in China in order to understand the concept of copyright.

To gather this information, we had been researching copyright law history and its development in China. Later, it will discuss the copyright protection for creative industries in China. Chapter II discusses copyright protection for creative industries in EU, including legal mechanisms in EU that relates to China and Spanish copyright protection for creative industries. In the end, the thesis will summarize the previous material, draw a conclusion, and give some suggestions. (For example, the "Green paper" that Europe has created to improve the culture through the technology or the actions which it takes to promote the exchange in cultural activities between Europe and China)

Key words: Creative industries, copyright, China, Europe, Spain.

摘要

在新近的全球化世界，许多科技也在人们的生活里改变，信息迅速变化。为求生存，人们需要如创意及创新的智力，来面对当下的情况。点子、信息、艺术，书本，表演，音乐，被用来做为改变智力的工具以及不同的观点，实际上，这些工具负责创造了一种文化并提高了其所属社会成员的身份。

这也是为何我们需要保护创意及设计。它们是新创意，因此需要予以维护。在本文第一章讲述了知识产权法的含义以及知识产权在中国的发展，以便了解著作权的概念。为了获取其信息，本文研究了中国著作权法的历史以及其在中国的发展。其后，本文讨论了中国对创意产业的著作权保护。第二章讲述了欧盟(EU)对创意的保护，包括其法律程序，涉及到中国与欧盟的创意产业以及西班牙对创意产业的著作权保护。本文最终总结了前面提到的资料，给予框架及建议（例如在欧洲,通过科技或为促进中欧之间文化交流行动所采取的行动,以提昇文化所创建的“绿色文件“）。

关键字：创意产业，著作权，中国，欧洲，西班牙

Contents

Introduction.....	9
Chapter 1..... Copyright Protection for Creative Industries in China.....	10
Subchapter 1 Copyright Protection in China	11
Section 1 Concept under China Copyright Law.....	15
Section 2 Copyright Object, Subject and Content.....	18
Section 3 Copyright Limitations.....	20
Section 4 Related Rights.....	24
Section 5 Copyright Infringement and Enforcement.....	28
Subchapter 2 Copyright Protection for Creative Industries in China.....	28
Section 1 Creative Industries in China.....	28
Section 2 What Can Copyright Do for the Chinese Creative Industries.....	30
Section 3 Industry Experiences and Case Studies.....	35
1. Enforcing Legal Entitlements Through The Courts.....	35
2. Film As A Vehicle For Advertising: Huayi Brothers Use Of Product Placement...	39
3. The Internet: New Possibilities.....	40
Subchapter 3 Brief Conclusion	43
Chapter 2 Copyright Protection for Creative Industries in EU.....	45
Subchapter 1. Copyright in EU.....	45
Section 1 Differences between continental and anglo-saxon copyright.....	48
Section 2 Related Legal Mechanism in EU related with China.....	49
Section 3 Famous cases of copyright infringement.....	54
Subchapter 2 Spanish Copyright Protection for Creative Industries.....	57
Section 1 Copyright Concept and General Protection	57
Section 2 Copyright Infringement and Enforcement.....	62
Section 3 Creative Industries in Spain.....	63
Subchapter 3 Brief Conclusion.....	68
Epilogue.....	70
Bibliography.....	74
Appendix.....	83

List of figures

Figure 1. GDP in EU and China.....29

Figure 2. Contribution to the PGD Industry.....31

Figure 3. Contribution to employment by Industry.....32

Figure 4. Economic data Europe and China34

Figure 5. Employment in the Creative industries.....65

Figure 6.Exportations and importations.....66

Introduction

How to improve the protection of the designs of clothes, the maps in architecture, the composition of music, the choreography of performances, paintings and photography? All of these goods and services belong to a sector known as the creative industries. What can we do to improve and develop this sector? Nowadays, the trade and commerce in commercial goods, such as wine, clothes, watches, is something really easy to produce, protect and put into commerce. But what about this goods and services that are ephemeral, that do not have a long duration and that we need to protect? The designers, the creative people who make up this work force, need to be protected. This is fashion, the people work based on the demands of their client's tastes, and things move at a very fast pace. Therefore, if we want to develop this sector in future, it will be necessary to advise and help the people who work in it.

The word cultural industry refers to those industries that combine the creation, production and marketing of creative content that is intangible and cultural by nature. These contents are usually protected by copyright, and may take the form of a good or service. Cultural industries generally include publishing, multimedia, audiovisual, phonographic, cinematographic production, craft and design.

The term **creative industry** is a wider range of activities including cultural industries, and all other cultural or artistic production. The creative industries are those which the product or service contains a substantial element of art or creativity. Some common examples would be sectors such as architecture and advertising.

As we can check in Chapter I, first of all, this thesis is going to explain what intellectual property (IP) law is, and how it starts to appear in China to understand the concept of copyright. For it we had been researching about the copyright law history and how it started to develop in China. Then, it will discuss the copyright protection for creative industries in China. Chapter II discusses copyright protection for creative industries in EU including related legal mechanism in EU related with China and Spanish copyright protection for creative industries. Finally, this thesis reaches conclusion and gives some suggestions.

Chapter 1. Copyright Protection for Creative Industries in China

Subchapter 1 Copyright Protection in China

Copyright is a part of intellectual property (IP) law. Intellectual property law refers to some of the rights related to ideas and innovations. Most countries agree that some inventions and creative works must be protected in a legal form. This is because the vast majority of workers and owners should be entitled to receive some benefit from the fruits of their labor. If they are guaranteed protection, they maintain incentives to innovate, otherwise creativity is discouraged. For this reason, IP law is divided into two big branches, industrial property and *copyright*.¹

Since the adhesion of the P.R China to the World Intellectual Property Organization (WIPO) in 1980 and the entry in the World Trade Organization (WTO) in 2001, the protection of intellectual property rights (IPR) has been an issue of rising importance for new legislation.²

Trade in copyright between the P.R China and other countries are increasing rapidly and therefore require protection on both national and international levels. With the international trade in copyright growing at an annual rate of 50% during the period between 1994 and 1999 and continuing to grow, copyright protection requires new legislation to keep up with technical developments, such as through the use of the internet. In spite of the described development, Chinese Copyright Law (hereinafter *CCL*) was amended in October 2001 for the first time. The revision mainly incorporated the necessary changes due to the accession of the PRC to the WTO and the requirements of the Accession Protocol.

In Feb. 2010, *CCL* was revised for the second time and went into effect on Apr.1, 2010. Notably, the amendment to Article 4 contained in the *CCL* (2nd Revision) was adopted primarily in response to recent findings by a WTO panel that China's denial of copyright protection of certain censored works was inconsistent with its TRIPs Agreement obligations.³ Copyright protection is now extended to all "works," without regard to restrictions on publication and distribution that are imposed by PRC authorities under other laws and regulations (these restrictions are unaffected by the amendments).

¹ Xhu, Yuquan. Concise Chinese law. Beijing, China Law Press 2007,81.

² Zhang, Yuwing; Gebhardt Inmanuel. Chinese intellectual property law. Comparative cases studies part 2. Department of treaty and law. Ministry of commerce PRC advisory service to the legal reform in china. Volume V.(1997). 102-103

³ See *Report of the Panel —CHINA 'C MEASURES AFFECTING THE PROTECTION AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS*, p.41, WT/DS362/R , [http://www.worldtradelaw.net/reports/wtopanels/china-iprights\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanels/china-iprights(panel).pdf), January 26 2009.

Section 1 Concept under China Copyright Law

Since the late 1980's China has taken major steps in the legislation improving its copyright law. The Chinese desire to open their doors to trade in order to encourage foreign direct investment.

There was no copyright norm in Chinese feudal history. Copyright was a purely western concept that was introduced in China in the 20th century under pressure from the western countries. On the other hand, the concept of copyright is contrary to the Chinese and Confucius culture, and is contradictory with the Marxist socialist ideology.⁴ Chinese law always encourages the society over the interests of individuals.

1. A brief introduction of Chinese History.

China has one of the most distinct and deep philosophies, which is essentially contradictory with the notion of copyrights.⁵ History indicates that China was ahead of Europe when it came to printing techniques that had been invented in the middle of the 11th century. China has an incredible traditional culture, and Confucianism was so basic to feudal Chinese philosophy and social conduct that is almost contradictory to the notion of copyright.

“As a legal concept, copyright seems even less attuned to the Chinese concept of law with its reluctance to rely upon rigid codification and abhorrence of litigation. The traditional Chinese conception of law is so different from the western concept that it has often been described as a rejection of the idea of law.”⁶

Confucianism always believes in the concepts of equality and individuality, and provides a basic premise for claiming copyright. Confucianism believed that past experiences were indispensable for personal moral growth. Confucius said: “I transmit rather than create, I believe and I love the ancients.” He believed that intellectual knowledge, as a whole, was the common heritage of all Chinese. They monopolized authority based on the wisdom of the past, spent time on literature, and tried to express them through art.

⁴ Ploman, E.W and Hamilton, L.C, copyright, Routledge&Kegan Paul, London, 1980 140.

⁵ Qu, Sanqiang .To understand the copyright in China. Copyright in China. 2002.4-8.

⁶ Ploman and Hamilton..see supra note 4 , at 142.

In China, the protection of printers, publishers and authors on occasions by means of official prohibitions had remained unchanged for more than eight hundred years, although in the Ming Dynasty this form of protection seems to have been suspended for some time. Neither written law for the protection of copyright nor clauses in statute law have been discovered.⁷ By the 17th and 18th centuries, with the European industrial revolution, Europe had begun to develop a concept of copyright.

Nevertheless, as early as 800 years ago China had some definitive notions regarding the idea of copyright or, intellectual property. The stamp, first appearing between the years 1190 to 1194 would read: this book was published and distributed by the Cheng Family of Meishan, *any reproduction without permission is forbidden*. The notice is strikingly similar to the modern copyright notice --© "All rights reserved". The question might still be raised, then: why has there been no copyright law in China for such a long time? ⁸

When the west pressured China to open its doors to trade, they had to make special concessions and foreigners were permitted to live in Guangdong and Macao to do business with licensed Chinese intermediaries, known as the Hong.⁹ After the Opium War (1839-1842) the social contradictions and conflicts with China became more intense. The government of the late Qing had become decadent. The Confucian school of thought lost the contact with Chinese reality and became absolutely conservative. At the same time, the west intensified their cultural invasion of China. The Europeans have acquired the drawbacks of bad trends for many years, and already forgotten the original ideas of the law creators. Prior to the opium war, there was a little foreign investment in China and trade was confined to items, such as opium, tea, raw silk, sold as bulk commodities instead of under brand names.¹⁰

In the second half of the 19th century, the western economic involvement in China expanded. At the same time, the infringements of intellectual property, such as foreign trade names and trademarks began to work.¹¹ To protect the interest of foreigners, the Qing government commenced a series of negotiations regarding protection of copyright. China did not have universal national laws to deal with the problem of copyright infringement. So, as China began to industrialize, they also began to duplicate the copyrighted works of foreigners.

⁷ Chengsi,Zhen; Pendleton, Michael. Copyright law in China. 1990. 16

⁸ See Zhou Lin, Copyright Law In China, <http://www.chinaiprlaw.com/english/forum/forum59.htm>, visited on March, 24, 2012.

⁹ Described in Fairbank, J.K, Trade and diplomacy on the china coast: the opening of the treaty ports, Harvard University Press, Cambridge. 1953. 45.

¹⁰ Gardella, R. " Boom years of the Fukien Tea trade, 1842-1888" in May E, and Fairbank, J.K. America's china trade in historical perspective: the Chinese and American performance, council on East Asian studies, Harvard University, Cambridge, 1986, .69.

¹¹ See also Allen G and Donnithorne A . Western enterprise in far eastern economic development , Mcmillan, New York, 1954. 61.

China did not provide any legal protection for copyrights until 1910. The law of authorship of Daqing Dynasty was promulgated. This law protected the intellectual property of a work during the lifetime of its author up until 30 years after his/her death.¹²

In 1928, the KMT government promulgated its first copyright law. The law provided that creators were entitled, upon registration with the Ministry of Internal Affairs, to protect books, music, photographics, designs, sculpture, and other technical literary and artistic works. In the case of non-Chinese authors, this protection was limited to 10 years.

In 1949, the People's Republic of China was founded.¹³ The copyright law changed and the nation had been influenced by the Mao ideology, and the creation of literature and art had to serve the overall social interest:

*“ Our purpose is to ensure that literature and art fit well into the whole revolutionary machine as a part that they operate as a powerful weapon for uniting and educating the people and for attacking and destroying the enemy, and that they help the people fight the enemy with one heart and one mind. ”*¹⁴

In the early 1960's, efforts were under way to recast the preliminary framework governing patents, trademarks, and the remuneration of authors for works that had been developed during the first decade of the PRC.

In March 1961, the Ministry of Culture in a meeting determined that the prior practice of remunerating authors in part according to the number of books printed or reprinted was to be eliminated. During this period, nationalism and collectivism became the national ethics, and all individual interest, even personal legal rights, were regarded as expressions of self-interest.

The Cultural Revolution (1967-1977) not only destroyed all fledgling attempts at copyright protection that the PRC had made during its first decade, but also deepened the misunderstanding of copyright contained in Chinese traditional culture.

During the cultural revolution, China made no progress at all in improving its copyright scheme. On the contrary, many aspects of copyright protection regressed considerably. Almost all

¹² Qu Sanqiang. *supra* note 5 , at pp. 26-27

¹³ *Id.* at .33.

¹⁴ See 1967, quotations of Chairman Mao Tse-tung, People's Publishing House, Beijing, 1973.

kinds of what the west would consider creative literature were regarded as bourgeois liberalism and restricted from publication and dissemination.¹⁵

From 1979 to 1985, the administration responsible for publication drafted a succession of administrative regulations with respect to copyright protection. The interim provisions declared by the Ministry of Radio and Television in 1982 also emphasized that the rights of authors, performers and audio-radio recorders would be protected in effective ways.

The copyright law in 1990 was promulgated and after these regulations they created the protection of computer software. Moreover, certain inadequacies continued in the RPC. For example, it did not indicate whether software is a literary work or not; nor did it cover the programs embedded in semiconductor chips. In the other chapter, we will remark on the main Conventions and Agreements that China made during this time.

The law is enacted according to the Chinese Constitution with the aim to protect the copyright of the authors and the creative workers, as inventors or designers in their literary, artistic and/or scientific works related with the copyright, in order to encourage them to continue to innovate and develop a better world.

16

2. How to define copyright

Copyright is defined as the personal right and property right legally enjoyed by authors and creators of literary, artistic and scientific works. This law stipulates that the copyright includes two categories; spiritual right and economic right.¹⁷

Art. 6 of the *CCL* provide that copyright arises at the date when creation of the work is complete. Para. 2 and 3, Art 21 provide that the term copyright of a work owned by an employer, or the copyright in a film, television broadcast, photograph, video or sound recording is 50 years from the date of publication. If the author is the owner of the copyright, the term is the life-time of the author plus 50 years after his death, in the case of published work.

¹⁵ Qu, Sanqiang. *supra* note 5, at p. 40.

¹⁶ Copyright Law of the People's Republic of China" (Revised in 2010) UPDATED: June 1, 2010 NO. 20 MAY 20, 2010 Adopted in the 15th meeting of the Standing Committee of the Seventh National People's Congress on September 7, 1990 and revised in the 24th meeting of the Standing Committee of the Ninth National People's Congress on October 27, 2001 in accordance with the Decision on Revision of the Copyright Law of the People's Republic of China for the first time and in the 13th meeting of the Standing Committee of the 11th National People's Congress of the People's Republic of China on February 26, 2010 in accordance with the Decision on Revision of the Copyright Law of the People's Republic of China for the second time.

¹⁷ China law guideline in protection of intellectual property rights. China market press. 2006. p. 1.

According to para. 1, Art. 2, foreign works receive the same treatment as works created by Chinese persons and entities. Any work of a foreigner or stateless person published for the first time and within the territory of China shall enjoy copyright in accordance with this Law. Any work of an author from a country not having concluded an agreement with China or entered into an international treaty jointly with China or of a stateless person, which is published for the first time in a country as a member of the international treaty into which China has entered or published in a member country and non-member country at the same time, shall be protected by this Law (See para. 2-4, Art. 2, *CCL*).

Art. 8 of the Implementing Regulations of the Copyright Law of the People's Republic of China (*hereinafter Implementing Regulation*) also provides that where works of foreigners or stateless persons are first published outside the territory of China and then, within thirty days, published in the territory of China, the works shall be deemed to have been simultaneously published in the territory of China., but the moral rights will be perpetual.¹⁸

Section 2 Copyright Object, Subject and Content

Works are the result of intellectual creation in the literary, artistic, and scientific fields and may be reproduced in a material form in accordance with Art. 2 of *CCL* and the *Implementing Regulation* formulated by the state council in 2002. They have to have three requirements:

- They should be the expression of ideas and feelings.
- They should be original
- They should be able to be reproduced in a material form.

The subject of the copyright enjoys the rights and bears the obligations of the copyright. The copyright has three categories;

- the first one includes the natural person, legal entity or other organizations that create the works: the authors.
- Second category includes the natural person, legal entities or other organizations, besides the author, who enjoy the copyright.

¹⁸ Zhang, Yuwing; Gebhard Inmanuel. Chinese intellectual property law. Comparative cases studies part 2. Department of Treaty and Law. Ministry of commerce PRC advisory service to the legal reform is china. Volume V. (1997). 113.

- The third category includes the natural person, legal entity or other organizations that is entitled to the copyright by trust contract or service the contract.

The object of the copyright refers to literary, artistic, and scientific works protected by copyright law.

1. Scope of copyrightable works

Copyrightable works in the fields of literature, art and science can be divided in two categories:

- *Ordinary*; art. 3, copyright law; written works; oral works; musical works; dramatic works; quyi works; choreography works; works of art; photography works; cinematographic, television and video works; drawings of engineering designs and product designs and their description: maps, diagrams and other graphic works; computer software. The special works for folklore, which China has yet to promulgate a separate regulation on it. (Art. 6, CCL).
- *Un-copyrightable works*; there are two types of un-copyrightable works; non conforming and illegal works: laws, regulations, resolutions, decisions, and orders of the state organs, other documents of a legislative, administrative or judicial nature, and their official translations. Currents news, calendars, numerical tables, forms of general purpose and formulas.¹⁹

2. What is protected?

The legal term work is defined in Art. 2 of the *Implementing Regulation* as an intellectual creation which is in the field of literature, arts or science, displays originality and is capable of reproduction in a certain tangible form.

3. Categories of works

Art. 3 of CCL supplemented by Art. 4 of the *Implementing Regulation* identifies particular categories of works as including:²⁰

- Literary works, including novels, poems, essays and similar written works;

¹⁹ Xhu yuquan. Concise chinese law.: Beijing, china law press 2007.,82

²⁰ Yuwing ,Zhang; Gebhardt, Inmanuel.Author: Chinese intellectual property law. Comparative cases studies part 2. Department of treaty and law. Ministry of commerce PRC advisory service to the legal reform is china. Volume V. (1997). 104-105

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